In the Supreme Court of the United States

OCTOBER TERM, 1966

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

GREAT DANE TRAILERS, INC.,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	1
Statute involved	2
Statement	2
Argument	4
Conclusion	10

CITATIONS

Cases:

American Shipbuilding Co. v. National Labor Relations Board 380 U.S. 300, 13 L.Ed 2d 855 (1965) 8

Local 357, International Brotherhood of Teamsters v. N.L.R.B. 6 L.Ed. 2d 11 (1961) 8

National Labor Relations Board v. Erie Resister, 373, U.S. 221 (1963) 5, 8

Statute:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, et seq.):

Section 8(a)(1) 1, 3, 4, 9

Section 8(a)(3) 1, 3, 4, 9

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OPINIONS BELOW

The decision of the Court of Appeals (Pet. 1a-11a)[1] is reported at 363 F.2d 130, 62 L. R. R. M. 2456. The Board's Decision and Order (R. 22-40, 56-59)[2] are reported at 150 N. L. R. B. 438, 58 L. R. R. M. 1097.

JURISDICTION

The Decision of the Court of Appeals was rendered on June 24, 1966 and a decree was entered on July 21, 1966. The jurisdiction of this Court is invoked under 28 U.S. C. 1254(1).

QUESTION PRESENTED

The issue here is whether the Court of Appeals was correct in holding that the Board could not find the employer in violation of Section 8(a)(1) and (3) of the National Labor Relations Act because it granted vacation pay to non-striking employees and

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[1] Reference to the Petition will be by the symbol "Pet." followed by the appropriate page number.

[2] "R" and "J.A." references are to the Transcript of Record and Joint Appendix filed in the Court below.

withheld vacation pay from striking employees when there was no evidence of anti-union sentiment and motivation behind such conduct.

STATUTE INVOLVED

The applicable portions of the National Labor Relations Act, as amended, (61 Stat. 136, 29 U.S.C. 151, et seq.) appear in Appendix B of the Petition.

STATEMENT

1. For some years the Union[3] has been the collective bargaining representative of Respondent's employees at its Savannah, Georgia, plant (R. 23). On April 30, 1963[4] the Union gave the Company notice terminating the existing contract and on May 16, approximately 348 employees, out of a work force of about 400, went on strike. The parties agreed that this was entirely an economic strike (R. 25). By July 1, approximately 259 of the striking employees had been replaced; by August 1, about 325 had been replaced and by October 8, all of the strikers had been replaced (R. 25-26; J.A. 32-33). By letters dated July 12, a number of the striking employees made demand upon the Company for payment of vacation pay claimed to be due them under the terms of the previously described contract (R. 25-26; J.A. 13, 42). In replying to the demand, the Company alluded to the fact that the Union had cancelled the contract approximately two months earlier and there was no contract in force at that time. The Company also raised the question of whether the discharged employees would be entitled under the contract to receive vacation benefits, even if the contract were in force. The Company further replied

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[3] International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local No. 26, AFL-CIO.

[4] All of the dates under discussion are in 1963, unless otherwise indicated.

that these were matters which should be resolved at the bargaining table and offered unconditionally to discuss the strikers' entitlement to vacation pay at the next negotiating session (J.A. 46-47).[5] The Union elected not to pursue the matter at the bargaining table (J.A. 34).

In August the Company afforded vacation pay to two categories of employees: (1) those who had not gone on strike and; (2) strikers who had returned prior to being discharged as a result of permanent replacement (J.A. 28, 30-31). Not all returning strikers received vacation pay (J.A. 30). The Company gave a simple explanation of its criteria for making payment: vacation pay was granted to all employees who "were there as of July the 1st" (J.A. 30).[6] These vacation benefits paid in August were in accordance with plant rules which the Company unilaterally promulgated after the Union terminated the existing contract and were not paid on the basis of the terminated contract, although the new rules were substantially the same as those which existed under the old contract (R. 27; J.A. 34-35).

2. The Board found that the Company violated Section 8(a)

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[5] In view of this offer Respondent must take issue with the Petitioner's statement (Pet. 4), that the Company refused payment and the implication that such refusal was solely the result of the Union's cancellation of the previous contract.

[6] It is noteworthy that the Company selected July 1, over a month earlier, as the date to qualify for vacation pay. Obviously this would not serve as an incentive for any of the strikers to return to work and it clearly was no reward to any striker who had returned subsequent to July 1. It is also significant that the new policy toward vacation pay was not given advance publicity and therefore did not act as inducement to the strikers to abandon their strike effort. In dismissing a portion of the charge the Board expressly found that the Company had not solicited the employees to abandon their strike and had made no offer of benefit if they would return to work (R. 35).

(1) and (3) of the Act in withholding vacation pay from employees who were not actually working on the July 1 qualification date, regardless of whether vacation pay was granted on the basis of the terminated contract or on the basis of the new rules adopted by the Company (R. 56-68). The Company was directed to cease and desist from withholding vacation pay from the employees and refrain from other unspecified acts of discrimination, interference or coercion (R. 37, 58-59).

3. The Fifth Circuit Court of Appeals, without dissent, denied enforcement of the Board's Order. It concluded that the facts gleaned from the record were not sufficient to support an inference of unlawful motivation and there was therefore "no substantial evidence in the record as a whole to support the conclusion that the Company violated Section 8(a)(3) and (1) of the Act . . ." (Pet. 11a). In arriving at this conclusion the court noted the requirements this Court has established as prerequisite to Section 8(a)(1) and (3) violations. One such requirement, it was pointed out, is an affirmative showing of unlawful motivation on the part of the employer. Recognizing that the record contained no evidence whatever of any such unlawful motivation, the Court of Appeals concluded that the Board had found the act of withholding the vacation pay "to be an ipso facto, per se violation" (Pet. 7a). The Court then considered whether the Company's conduct was of such a nature as to carry with it so compelling an inference of unlawful intention as to render it unnecessary to produce specific evidence of unlawful intent or other anti-union animus. The court concluded the Company's conduct in the instant case was not of such a nature (Pet. 8a-9a).

ARGUMENT.

The Court of Appeals held that it could not accept the Board's conclusion, arrived at without even a scintilla of evidence of unlawful anti-union motivation, that the employer committed an unfair labor practive by initiating a new practice for vacation pay,

to replace that contained in the previously terminated union contract, and withholding vacation pay from employees who were not actually working on a certain day more than a month before the new practice was announced and the payment was made.

It did *not* hold that it would be lawful under any circumstances, and not an unfair labor practice, for an employer to deny accrued vacation pay to striking employees, while granting such vacation pay to non-strikers and striking employees who had returned to work.

The decision of the Court of Appeals is not apt to have the far reaching consequences suggested by the Petitioner and is consistent with this Court's decision in *National Labor Relations Board v. Erie Resister*, 373 U. S. 221, 10 L.Ed2d 308 (1963). There is, therefore, no occasion for further review.

1. An analysis of the inherent characteristics of the super-seniority plan encountered in *Erie Resister* and subsequent comparison with the conduct involved in the instant case, leads to the inescapable conclusion that the reasoning advanced in *Erie* was not intended to be applicable to the type of situation involved herein.

One characteristic of the super-seniority plan was its rather obvious and significant effect on tenure. Under any interpretation of the vacation pay practice in the instant case, it clearly had no effect upon tenure.

Another aspect of super-seniority is the fact that it "necessarily operates to the detriment of those who participated in the strike, as compared to non-strikers". Here there is at best a very limited analogy to this case because the vacation plan did not necessarily operate to the detriment of strike participants as evidenced by the fact that some were given the same benefits as non-strikers.

Thirdly, it was said that super-seniority, which was made available to striking employees, is in effect an inducement to strikers to

abandon the strike. Clearly this was not the case here for the vacation plan, as it was first formulated and announced, could not by its very nature operate to benefit any then striking employee. It could not therefore have served as inducement to abandon the strike.[7]

Extension of super-seniority benefits, the Court noted, deals a crippling blow to the strike effort. It can hardly be said that payment for a single vacation period would so "undermine the strikers' mutual interest" as to jeopardize the strike effort, especially in view of the fact that some strikers who had abandoned the strike cause received nothing in the way of vacation pay. Further evidence of the lack of any crippling effect on the strike effort is the fact that the strike continued for months after the announcement and payment of the vacation benefits.

Finally, it was said the super-seniority rendered future collective bargaining difficult, if not impossible, for the bargaining representative because it would continue to be an issue long after the strike is over and would create a lasting cleavage between two employee groups, those who leaped up the seniority ladder and those who were left out. Once again the characteristic and effects of super-seniority do not exist here. Future bargaining on the matter of vacation benefits and other terms and conditions of employment will be no more difficult (let alone, impossible) in the future.[8]

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[7] The foregoing, coupled with the fact that the Board expressly found that the Company had not engaged in activity designed to induce the strikers to return, is perhaps the most important factor which distinguishes the instant case from *Erie Resister*.

[8] The Company offered to negotiate the question of the strikers entitlement to vacation pay in this particular instance, which indicates the bargaining representative had no cause to anticipate future difficulty negotiating such matters.

It is doubtful that any appreciable number of returning strikers qualified for the vacation pay and it must be obvious to the remaining strikers that those who did so came by the benefit purely by accident by returning prior to a date which, at the time they returned, was of no particiular significance. The vacation pay was given but one time and that was the end of it. Surely, this does not carry with it the type of day-to-day awareness a substantial overnight leap in seniority would have.

It is clear that in *Erie* this Court was motivated by what it felt was a duty to implement the Congressional "concern for the integrity of the strike weapon." The thrust of the opinion is concern that the strike would no longer be an effective weapon in the hands of organized labor. In short, the reasoning in *Erie* is the product of a consideration of the deference which must be accorded the strike weapon and the "devastating consequences" upon it which the super-seniority program precipitated.

It cannot be repeated too often that the employer's conduct in the instant case had no destructive effect upon the strike; indeed it had no noticeable effect whatever.

Furthermore the employer's conduct was not inherently discriminatory, as the Petitioner contends, because it did not, by its very nature, discriminate against employees who exercised their right to strike. The vacation pay was awarded to striker and non-striker alike; the sole basis of eligibility was the fact of working on July 1, not the fact that the worker had or had not exercised his right to strike.

2. The Court of Appeals did not ignore this Court's holding in *Erie Resister*. The very argument advanced by the Petitioner, derived almost exclusively from *Erie*, was considered and rejected by the Court below because the conduct with which it was dealing

simply did not measure up to the variety encountered in *Erie*.* Quoting from the decision of this court in *American Shipbuilding Co. v. National Labor Relations Board*, 380 U.S. 300, 13 L.Ed. 2d 855 (1965) the Court below recognized that some employer conduct may carry with it so compelling an inference of unlawful intention that it would be proper to disbelieve the employer's assertion of innocence. The court then squarely faced the issue and undertook to determine the applicability of the foregoing rule to the situation at hand when it said:

> "Thus, we must decide whether the Company's withholding of vacation pay 'carries with it an inference of unlawful intention *so compelling* that it is justifiable to disbelieve the employer's protestations of innocent purpose.' (Emphasis added). We find that it does not."

The quotation (Pet. 8) from the opinion below should not in fairness be considered out of context. It was immediately preceded by the holding that the employer's conduct was not of the inherently discriminatory variety found in *Erie* and discussed in *American Shipbuilding*. It was therefore no more than reaffirmation of the rule that the burden is on the Board to show an illegal motive, *Local 357, International Brotherhood of Teamsters v,*

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* Assuming the court did acknowledge the rationale of *Erie* but found it inapplicable to an extremely dissimilar factual situation, it is difficult to see where the alleged conflict with *Erie* exists. *Erie* did not purport to hold that all discriminatory conduct, regardless of motive, was *per se* unlawful and the prohibition of *Erie* was not intended to apply to all varieties of employer discrimination. The Court below held that it did not apply to the conduct involved here. By asking the Court to review this holding by means of certiorari, Petitioner assumes that *Erie* was intended to reach all forms of employer discrimination and the court below was obliged to apply *Erie* to this inherently different variety of conduct. The failure to do so is said to raise a conflict with that decision.

N.L.R.B., 6 L.Ed.2d 11 (1961), and unless the Board has produced at least some specific svidence of illegal intent or, in the alternative, an *Erie* variety of inherently discriminatory conduct is involved, the Section 8(a)(1) and (3) violation has not been established. In the instant case, there was admittedly no specific evidence of unlawful intent and the activity was greatly dissimilar from the super-seniority program.[10]

a. It is submitted that the fact the Company did not withhold vacation benefits in order to break the strike is quite material and the fact that this conduct had no effect whatever upon the strike is even more material. The existance of these two factors demonstrate the wide gulf separating this case from *Erie;* they also indicate there has been no encroachment upon congressional solicitude for the right to strike. The trial examiner's finding that the Company retaliated against strikers and the Petitioner's suggestion that it imposed a penalty upon them have in common the fact that they derive no support from the record. The allegation that the Company withheld vacation benefits "solely because of strike activity" is inconsistent with Petitioner's Statement of the case (Pet. 4).

b. It was not incumbent upon the Company to advance a "legitimate business purpose" because the conduct involved did not carry "its own indicia of intent". *National Labor Relations Board v. Erie Resister,* 373 U.S. 221 (1963). It was incumbent upon the Board to advance some evidence of illegal intent or purpose and this has not been done. Instead the Board conjectured that the employer's conduct was retaliation against striking employees and on the basis of such conjecture the Company was adjudged guilty of the 8(a)(1) and (3) violation.

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[10] The Board's quotation (Pet. 8, n.5) from this Court's opinion in *Erie* is afield of the matter under discussion. We are not here concerned with excusing unlawful conduct; we are concerned with what is required to establish unlawful conduct.

3. It cannot be said that the decision of the Court below will have any greater impact upon Labor-Management relations than the decisions of this Court relied upon in the opinion. The decision below does nothing to disturb the balance which earlier decisions of this Court have struck between the conflicting legitimate interests of both sides. It is submitted that an extension of the rationale of Erie to the type of situation involved here would promote considerable confusion as to just what employer conduct is permissible. Once the step is taken and Erie is found applicable to conduct which has no impact upon the right to strike it would be relatively simple to apply it to any type of employer conduct, despite the fact that no unlawful anti-union motive existed and despite the further fact that the conduct had no detrimental effect upon exercise of the right to strike or any other right guaranteed by the Act.

Neither the Board nor the Court below undertook to find anyone was "contractually entitled" to the vacation pay under discission. Even if it were determined that we were dealing with a contractually vested fringe benefit, it appears inconceivable that the Company could effectively work a forefeiture thereof in view of provisions of Section 301 of the Act and the remedy therein provided for contract breaches of this nature.

CONCLUSION

The special and important reasons do not exist for granting a writ of certiorari in this case and the petition should be denied.

Respectfully submitted.

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